SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

Term, 1969

No. 474

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent-Appellee,

vs.

MELVIN KRAFT,
Defendant-Appellant.

ON APPEAL FROM A CERTIFICATE DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1969

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IN THE

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Term, 19

No.

THE PEOPLE OF THE STATE OF NEW YORK,

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vs.

MELVIN KRAFFT,

Defendant-Appellant.

ON APPEAL FROM A CERTIFICATE DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Defendant-appellant appeals from a certificate denying leave to appeal to the Court of Appeals of the State of New York, pursuant to Section 520 of the Code of Criminal Procedure of the State of New York, said certificate being dated May 18, 1969, and the defendant-appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below.

The opinion of the County Court of the County of Onondaga, State of New York, was not reported: that

opinion is attached hereto as Appendix A. The certificate denying leave to appeal to the Court of Appeals was not reported: a copy of that certificate is attached hereto as Appendix B.

Jurisdiction.

The notice of appeal was filed in the County Court of the County of Onondaga, State of New York, on June 17, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C. Section 1257 (2).

The Statute Involved.

This appeal involves the validity of Section 381 (6) of the Vehicle and Traffic Law of the State of New York, which provides:

> "It shall be unlawful, on and after January 1, 1967, for any person to operate or ride upon a motorcycle unless he wears a protective helmet of a type approved by the commissioner. Such a helmet must be equipped with either a neck or chin strap and be reflectorized on both sides thereof. The commissioner is hereby authorized and empowered to adopt and amend regulations covering the types of helmets and the specifications therefor and to establish and maintain a list of approved helmets which meet the specifications as established hereunder. The police authorities of a city, town or village may issue a permit exempting members of organizations sponsoring or conducting parades or other public exhibitions from the provisions of this subdivision while such members are participating in such parades or other public exhibitions" (McKinney's Consolidated Laws of New York, Volume 62A, Cumulative Annual Pocket Part, 1968-69, p. 67).

Question Presented.

Is a statute requiring a motorcyclist to wear a helmet a valid exercise of the police power of the State in protecting the public welfare, or is it an unreasonable infringement of individual liberty in the right to wear whatever one chooses, so long as that action affects no one but the individual himself?

Statement.

On May 14, 1967, the defendant was issued a traffic summons for violating Section 381 §6 of the Vehicle and Traffic Law of the State of New York, specifically:

> "Operating a motorcycle without a protective helmet."

On June 7, 1968, the defendant appeared in Justice Court in the Town of DeWitt, County of Onondaga and State of New York, and admitted that he wore no protective helmet, as required by the statute, but, though his attorney challenged the constitutionality of the statute, on the grounds that the statute represented an improper and over-reaching use of the police power, resulting in undue infringement on the constitutional guarantees of personal liberty and the rights to the free use of an individual's property. Thus, the defendant argued, the statute violated both the State and Federal Constitutions. The Justice of the Peace held that the statute was constitutional and fined the defendant Ten Dollars.

The defendant duly appealed to the County Court of the County of Onondaga, State of New York, on the grounds that the statute violated both the Federal and State Constitutions.

In the decision of Onondaga County Court Judge Albert Orenstein, dated March 4, 1969, the statute was

held constitutional, and an order to that effect was entered on March 12, 1969.

The defendant, pursuant to Section 520 of the Code of Criminal Procedure of the State of New York, next sought leave to appeal to the Court of Appeals and on May 18, 1969, a certificate denying leave to appeal to the New York State Court of Appeals was signed by Honorable Francis Bergan, Associate Judge of the Court of Appeals of the State of New York.

The Question is Substantial.

There is only one issue involved on this appeal, and that is, whether a State statute can require a motorcyclist to wear a helmet as a valid exercise of the police power of the State in protecting the public welfare, or whether such a statute is an unreasonable infringement of individual liberty in the right to wear whatever one chooses, so long as that action protects no one but the individual himself.

It is settled constitutional doctrine that the State's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals, or welfare.[1] On the other hand, if the Court can find no relationship between the statute and the public health, safety, morals, or welfare, the statute is unconstitutional.[2] If there is no benefit flowing to the public from the enforcement of a statute which restricts individual freedom, there is a denial of liberty without due process of law.[3]

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[1]See, *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937); *VanOster v. Kansas*, 272 U. S. 465 (1926); *Pacific Gas Co. v. Police Ct.*, 251 U. S. 22 (1919).

[2]See, *Griswold v. Connecticut*, 381 U. S. 479, (1965).

[3]See, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 (1927); *Atkin v. Kansas*, 191 U. S. 207 (1903).

Motorcycle expansion during the last ten years has been tremendous, and the cycle is now widely accepted as a means of economical transportation, as well as exciting recreation. Motorcycle registration increased from one-half million in 1960 to almost two million in 1967.[4]

In 1966 Congress authorized the Federal Government to commence a major program to increase highway safety. Basic to this campaign was the Highway Safety Act, which established a three-year Federal Highway Safety Program and required the formation of similar programs on the state level.[5] Congress provided that failure by any state to implement an approved program by December 31, 1968, would terminate all Federal Funds for the program and reduce the state's Federal Highway Appropriation by ten per cent. The National Highway Safety Bureau was charged with implementing the Highway Safety Program and one of the Bureau's initial proposals was to make the wearing of protective helmets by motorcycle riders mandatory. The proposal was incorporated by Congress into the National Uniform Standards for Highway Safety Programs.[6] The states, thinking perhaps both of safety and the threatened loss of highway funds, were induced to adopt helmet legislation. Presently, thirty-four states require the wearing of motorcycle helmets and two states require that they be carried with the cycle as equipment, but need not be worn.

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[4]Motorcycle registrations in 1960 numbered 575,500. *U. S. Bureau of Census, Statistical Abstract of the United States*: 1961, at 559 (82d ed. 1961). The number registered in 1967 was 1,953,000. *U. S. Bureau of Census, Statistical Abstract of the United States*: 1968, at 553 (89th ed. 1968).

[5]Highway Safety Act of 1966, 23 U. S. C. A. §§401-404 (Supp. 1967).

[6]H. R. Doc. No. 138, 90th Cong., 1st Sess. 2-3 (1967) states: The program shall provide as a minimum that: each motorcycle operator wears an approved safety helmet * * * each motorcycle passenger wears an approved safety helmet * * *.

These helmet statutes have produced much litigation challenging their constitutionality, on the grounds that the judicial limits of the police power of the state have been exceeded and that, under our system of Constitutional Government, there is some fundamental point at which the individual, himself, can decide what course of conduct he will follow in his own protection, wherein that course of conduct affects no one but the individual. The highest Courts in the states of Michigan, Illinois and Louisiana have held helmet statutes unconstitutional.[7] The highest Courts in Rhode Island and Massachusetts have held the statute valid.[8] All cases concerning the statute were decided on the same constitutional grounds presented in this case.

The Courts which have declared the helmet statutes unconstitutional have been unable to find a sufficient relationship between the helmet requirement and the welfare of the community at large. The Michigan Court felt the statute was only a protection of the cyclist himself from severe head injuries and that any other interpretation was a strained effort to justify what is admittedly wholesome legislation.[9] The Louisiana Court declared that the only function of the helmet requirement was to minimize the extent of injury to the individual cyclist and did not contribute to the safety of the motoring public at large.[10] The Illinois Court said:

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[7] *American Motorcycle Association v. Davids*, 9 Mich. App. 655, 158 N. W. 2d 72 (Ct. App. 1968); *The People of the State of Illinois v. Donald Fries*, Illinois Supreme Ct. Docket No. 41624, Agenda—17, March, 1969 (Citation unavailable at this time); *Everhardt v. City of New Orleans*, 208 So. 2d 423 (La. Ct. App. 1968).

[8] *State ex rel. Colvin v. Lombardi*, 241 A. 2d 625 (1968); *Commonwealth v. Howie* (Mass.), 238 N. E. 2d 373 (1968).

[9] *American Motorcycle Association v. Davids*, 158 N. W. 2d 72 (1968).

[10] *Everhardt v. City of New Orleans*, 208 So. 2d 423 (La. Ct. App. 1968).

> "The manifest function of the headgear requirement in issue is to safe-guard the person wearing it—whether it is the operator or passenger—from head injuries. Such a laudable purpose, however, cannot justify the regulation of what is essentially a matter of personal safety."[11]

On the other hand, those Courts which have upheld the helmet statutes advance various arguments to support the necessary relationship to the public welfare. The two main arguments in support of the statute are that it is in the interest of the State to have a strong, robust, healthy citizenry capable of self-support and adding to the resources of the country and that as long as the means are reasonable the Legislature can protect individuals from themselves to further that interest, and, secondly, that the crash helmet would prevent accidents caused by cyclists who lose control of their machines because of being struck in the head by flying objects.

With respect to the New York statute, it is clear what the Legislature had in mind, as evidenced by a legislative memorandum which cited an extensive study showing that most motorcycle fatalities could have been avoided by wearing the proper helmet.[12] It is clear,

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[11] *The People of the State of Illinois v. Donald Fries*, Illinois Supreme Ct. Docket No. 41624, Agenda—17, March, 1969 (Citation unavailable at this time).

[12] See, *New York Session Laws*, 2961 (McKinney 1966) (Citing the results of that study): The number of accidents involving motorcycles is increasing rapidly. In fact motorcycle accidents increased by 105% in 1965, as compared to 1964 * * * fatalities increased by 63.6% and personal injury accidents by 100%. A summary of the department's statistics indicates that 89.2% of the motorcycle accidents result in injury or death and that almost all fatalities occurring as a result of such accidents involve head injuries. Most of these fatalities could have been avoided, or the severity lessened, by the use of a proper helmet.

The helmet requirement, continues the memorandum, "Should go far in protecting the *drivers and passengers* on motorcycles" *Id.* (Italics supplied.)

then, that the New York State statute as evidenced by the legislative intent, is solely to protect the cyclist and his passenger. While the study adequately demonstrates that helmets prevent individual cyclists from being injured, there is no evidence to show that the use of helmets has ever prevented the occurrence of an accident. It is clear, therefore, that the New York statute is aimed at protecting the motorcycle driver and his passenger.

There is no question that it is a good idea for the motorcyclist and his passenger to wear protective headgear, as its value is generally recognized. Whether the State can impose penal sanctions for failure to wear a helmet is another question. To be sure, some degree of government control is necessary if we are to have safety on the highways. However, in this case, the traditional limits of the police power have been unjustifiably overextended in a strained attempt to achieve what is admittedly wholesome legislation.

The police power of the State is the least limitable powers of government, because it is used to protect the public welfare. However, it is settled constitutional doctrine that the State's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals or welfare.[13] The time honored maxim:

"*Sic utere tuo ut alienum non laedas*" (so use your own that you do not injure that of another) has been the basis of the police power. The application of this rule has limited the police power to instances where one individual's conduct adversely affected others. The helmet statute in its present form represents an extension of the limits of the police power to include the

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[13] *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937); *VanOster v. Kansas*, 272 U. S. 465 (1926); *Pacific Gas Co. v. Police Ct.*, 251 U. S. 22 (1919).

regulation of an individual's conduct where he alone could be adversely affected.

The Onondaga County Court based its decision that the law was constitutional primarily on two reasons, first of all, that the use of the public highways is a privilege and not a right, and, therefore, is subject to regulation by the Legislature. The simple answer to this is that even though the use of the highways may be only a conditional privilege, subject to State control, it cannot exercise its power arbitrarily, and the Legislature must still determine that the public welfare is endangered and must reasonably exercise the police powers to meet that public need. The Court's second reason was that while concededly the statute may infringe the rights of the individual, that such infringement was incidental to a valid exercise of the police power and was not unreasonable. The Court in *American Motorcycle Association v. Davids*,[14] said that to allow this type of regulation was to open the door to an unlimited benevolent paternalism of government which would surely be inimical to a democratic way of life and our constitutionally protected liberties.

Respectfully submitted,

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[14] *American Motorcycle Association v. Davids* (Mass.), 158 N. W. 2d at 72.

APPENDIX A.

Memorandum-Opinion of Orenstein, J.

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ONONDAGA.

THE PEOPLE OF THE STATE OF NEW YORK

vs.

MELVIN KRAFFT.

Appearances:

Frank A. Gualtieri, Jr., Esq., District Attorney of Onondaga County, Jon K. Holcombe, Esq., of counsel, Attorney for the People.

Victor J. Ciabotti, Esq., Attorney for Defendant.

ORENSTEIN, J.:

Memorandum.

The defendant has appealed to this Court from a judgment of conviction for not wearing a protective helmet when operating a motorcycle on Route 5 within the Town of Dewitt, in violation of Section 381 (6) of the Vehicle and Traffic Law of the State of New York, rendered on June 7, 1968, by Hon. George J. Kimball, Town Justice of the Town of Dewitt, Court of Special Sessions, Onondaga County, State of New York.

Defendant was fined the sum of $10.00 and now appeals to this Court upon the ground that the following

statute "violates the constitution of the State of New York and the United States of America":

> "6. It shall be unlawful, on and after January first, nineteen hundred and sixty-seven, for any person to operate or ride upon a motorcycle unless he wears a protective helmet of a type approved by the commissioner. Such helmet must be equipped with either a neck or chin strap and be reflectorized on both sides thereof. The commissioner is hereby authorized and empowered to adopt and amend regulations covering the types of helmets and the specifications therefor and to establish and maintain a list of approved helmets which meet the specifications as established hereunder."

Specifically, defendant contends that the statute is: discriminatory; an improper delegation of authority to the Commissioner of Motor Vehicles; too indefinite to be enforceable and a violation of the Commerce Clause of the United States Constitution. Furthermore, defendant argues that the legislation authorizes "an unwarranted use of police power in conflict with the right of an individual in the proper and free use of his private property."

In a brief filed in opposition to the above contentions, the District Attorney submits that "The legislative purpose in adopting the subject statute is obviously to stem the flow of blood which has become so prevalent upon the public highways." Concluding in part that,

> "* * * the instant defendant derived his right to operate his motorcycle only by a license and it cannot be contested that the right to drive a motorcycle on public highways is not an absolute one but subject to regulation by the Legislature."

A review of the history and purpose behind the legislation in question led the Court in *People v. Carmichael*, 56 Misc. 2d 388, pages 390-391, to hold the statute constitutional, reasoning that:

> "* * * it is apparent that the challenged legislation requiring the wearing of a protective helmet for self-protection is a valid purpose of legislative action under the police power of the State. Indeed, the inherent danger of operating a motorcycle, not only to the driver but to other users of the highway, has likewise been considered in upholding the validity of this statute as a valid objective of the State's police power (*People v. Schmidt*, 54 Misc. 2d 702).
>
> "* * * While concededly the instant legislation may infringe on the rights of the individual, it is equally apparent that such is incidental to a valid exercise of the police power and is not unreasonable. When the sole object and general tendency of legislation is to promote public welfare there is no invasion of the Constitution even if enforcement of the law interferes to some extent with liberty or property (*Matter of Viemeister*, 179 N. Y. 235)."

Subdivision 6, Section 381 of the Vehicle and Traffic Law has also been held to be a reasonable exercise of police power of the state and constitutional in the following cases:

People v. Newhouse (1968), 55 Misc. 2d 1064;
People v. Bielmeyer (1967), 54 Misc. 2d 466.

The judgment appealed from is affirmed.
Submit order accordingly.

Dated: March 4, 1969

ALBERT ORENSTEIN
Onondaga County Judge

APPENDIX B.

Certificate Denying Leave.

COURT OF APPEALS,

STATE OF NEW YORK.

Before:

Hon. Francis Bergan, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MELVIN KRAFFT,

Defendant-Appellant.

I, FRANCIS BERGAN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
May , 1969.

FRANCIS BERGAN
Associate Judge

SUPREME COURT OF THE UNITED STATES

October Term, 1969

KRAFFT *v.* NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 474. Decided November 10, 1969

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

evidence, the only legal issue presented, considered, reviewed, and determined by the Colorado Supreme Court was whether or not Senate Bill 405 (C.R.S. 123-35-1, et seq ('67 Perm. Supp.)) contravened Article V, § 25 of the Constitution of Colorado.

Colo. R. Civ. P., Rule 115(c)(5) requires that all briefs before the Supreme Court of Colorado contain in applicable part: "The argument exhibiting clearly, separately and without unnecessary repetition the point of facts and law being presented and citing the authority and statutes relied upon". Even though appellees were successful in the trial court, they had the option on writ of error to raise the equal protection argument in support of the trial court's judgment. However, appellant elected to stand solely on the special legislation issue.

Even though the Colorado Supreme Court relied on *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933), such fact is not indicative that the court determined the case on federal grounds. The rationale of *Williams* adopted by the Supreme Court of Colorado was a state issue and not a federal issue. In arriving at its conclusion as to the validity of Maryland law, this Court said: "Our endeavor in what follows is to extract the essence of the decisions [Maryland] and give effect to it as law." (pg. 46, U.S.). Consequently, the judgment below is grounded solely on state grounds — was Senate Bill 405 in conflict with the interdiction of Article V, § 25, Constitution of Colorado.

The Fourteenth Amendment question is first raised before this Court by the jurisdictional statement. The issue of whether the statute in question is invalid as re-

pugnant to the Constitution of the United States was not presented to, considered by or expressly passed on by the Colorado Supreme Court. It follows therefore that this Court is without jurisdiction to consider the issues raised by appellant and the appeal must be dismissed. *Wilson* v. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946).

Motion to Affirm

The appellees move, in the alternative, pursuant to U.S. Sup.Ct., Rule 16 1.(c), 28 USCA for affirmance of the judgment of the Supreme Court of Colorado on the ground that the questions presented are so unsubstantial as to not need further argument.

Argument in Support of Motion to Affirm

The Constitution of the United States in no manner or form proscribes or inhibits a state from enacting special legislation. The question presented therefore is whether the legislation in question contravenes the Equal Protection Clause of the Constitution of the United States. We submit that the authorities relied on by appellant to formulate an equal protection issue are pellucidly inapposite and no equal protection question of substance is presented.

Taxation is not an assessment of benefits. The foundation of appellants equal protection argument is that the tax burden of the school district outweighs or is disproportionate to the benefits which accrue to the appellant by virtue of the formation of the Morgan County Junior College District. In support of this grievance,

appellant cites authority applicable to special improvement districts. Principles relating to special improvement districts are not relevant to a school district which may, incidently, possess the authority to levy and assess an ad valorem tax to the extent necessary to fulfill its public purpose. *Atchison T. & S.F. Ry. Co.* v. *Public U. Commission*, 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51 (1953).

A school district is an instrumentality of the state designed as a means to provide education. It is a vehicle to accomplish a public purpose and is created pursuant to the legislative general welfare prerogative. Any authority to tax therefore is an authority to tax in support of government. In this regard, the following statement of this Court is pertinent:

> "A tax is not an assessment of benefits. It is as we have said, a means of distributing the burden of the cost of Government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.... Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principal of government — that it exists to provide for the common good." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 522, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

It necessarily follows that equal protection imposes no rigid rule of equality of taxation. *Carmichael* v. *Southern Coal & Coke Co.*, supra.

"Territorial uniformity is not a constitutional requisite." The equal protection argument is further augmented by the complaint that only those within the district are liable for a property tax while those without are free of the tax burden. This premise is equally unsubstantial. Equal protection does not require territorial uniformity. Equal protection is concerned with persons and not territory. As stated in *Salisburg* v. *State of Maryland*, 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1954):

> "The Equal Protection Clause relates to equality between persons as such rather than between areas. (pg. 551, U.S.) . . .
>
> "Territorial uniformity is not a constitutional requisite." (pg. 552, U.S.).

A state law need not therefore apply to the total area of a state but may properly be imposed as to those within a part of the state provided that the law uniformly applies to all within that territory. *Salisburg* v. *State of Maryland*; supra; *Milhelm* v. *Moffat Tunnel Improvement District*, 262 U.S. 710, 43 S.Ct. 694, 67 L.Ed. 1194 (1923).

The decision of the Supreme Court of Colorado is conclusive as to the rational basis which supports the enactment of the statute. Thirdly, appellant ardently contends that there is no rational basis for the enactment of the law and thereby results in an invidious discrimination against him. In this regard, the decision of the Supreme Court of Colorado is dispositive, if not conclusive. As held by the Colorado Supreme Court, the executive servant of the General Assembly effectuated an unwarranted frustration of the legislative intent expressed by the general law providing for the formation

and establishment of junior college districts. In order to fulfill the legislative mandate of the general law which was "... set for naught by the device of an administrative moritorium.", it became necessary for the General Assembly of Colorado to enact Senate Bill 405 "... to meet the exigency created by the State Board of Education ...". *Morgan County Junior College District* v. *Jolly*, ... Colo. ....., 452 P.2 34, 37, 38 (1969). Under such circumstances, the rationale of this Court expressed in *Williams v. Mayor and City Council of Baltimore*, supra and adopted by the Colorado Supreme Court is decisive.

The questions raised are not of constitutional dimensions, but political questions. In essence the questions raised by the appellant are not of constitutional dimensions, but are in reality political questions. Whether or not the citizens of the district desire the benefits of a junior college conveniently located within their territorial limits or wish to forego such benefit and send their children to a more distant junior college is a political question to be determined by the citizenry. Likewise, whether the junior college district remains a local district or becomes a state junior college as provided by statute is a question of relative benefit and advantage to be determined by the citizenry of the district and therefore a political question. C.R.S. '63, 124-26-29 ('67 Perm. Supp.).

Conclusion

The questions raised by appellant's jurisdictional statement raise no federal issue which necessitates further argument. The judgment of the Supreme Court of Colorado should be affirmed.

Respectfully Submitted,

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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 453

CHARLES L. JOLLY,

Appellant

v.

MORGAN COUNTY JUNIOR COLLEGE DISTRICT, et al

Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 453

CHARLES L. JOLLY,

Appellant

v.

MORGAN COUNTY JUNIOR COLLEGE DISTRICT, et al

Appellees.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

While the appellant's position is set forth adequately in the Jurisdictional Statement, it seems appropriate to reply to several contentions asserted by appellees in their Motion to Dismiss and Motion to Affirm.

RAISING FEDERAL QUESTION

Appellees contend that appellants could have raised the federal question in the Supreme Court of Colorado, and appellees cite Rule 115 (C)(5), Colorado Rules of Civil Procedure, in support of this contention. It is of great significance to note that appellees omitted citing other important Rules which were applicable to the case at bar.

Rule 59(f), Colorado Rules of Civil Procedure, provides as follows:

> "The party claiming error in the trial of any case (except as provided in subsection (h) of this rule) must move the trial court for a new trial as herein-above

provided and the trial court may not dispense with the necessity for filing such a motion but may dispense with oral argument on the motion after it is filed, *and only questions presented in such motion will be considered by the Supreme Court on review.* (*Emphasis Supplied*)

Plaintiff appellant herein raised the federal question in the trial court, not only in the Complaint (Jurisdictional Statement, Appendix C, page 40), but also on oral argument to the trial court. The appellant prevailed in the trial court and therefore, there was no need to move for a new trial within the time limitation. Must an appellant place in jeopardy a favorable judgment from a trial court, or surrender the benefits which flow therefrom, by moving for a new trial, merely in order to raise a federal question on review by the Supreme Court of Colorado? Appellant submits that such would be a strained interpretation of the Rules of Civil Procedure, which should be interpreted in the light of justice.

In Colorado, it is mandatory upon a party claiming error to move the trial court for a new trial, and only questions presented in a motion for a new trial will be considered on review. *Security Building Co.* v. *Lewis*, 255 P. 2d. 405, 127 Colo. 139; *Watson* v. *Watson* 310 P. 2d. 554, 135 Colo. 296; *Patton* v. *Ten Broeke Carriage Mfg. Co.*, 3 Colo. App. 267.

It is submitted that a literal interpretation of the Colorado Rules of Civil Procedure pertaining to a motion for a new trial, at which time specific errors must be asserted, would only require a successful plaintiff to jeopardize the benefits flowing therefrom in order to raise a federal question in the Supreme Court of Colorado, and that such interpretation should not prevail insofar as it relates to appellees' motions or to this Honorable Court taking jurisdiction in the case at bar.

SUPREME COURT OF COLORADO RAISED FEDERAL QUESTION

Appellees contend that, even though the Supreme Court of Colorado relied upon the decision of this Honorable Court in *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015; in its own decision (Jurisdictional Statement, Appendix B, page 26), such fact is not indicative that the Supreme Court of Colorado determined the case on federal grounds.

An action arises under the Constitution or a law of the United States so as to give a federal court jurisdiction whenever the correct decision of the action depends on the construction of the Constitution or law. *Cohens* v. *State of Virginia*, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257; *Patton* v. *Brady*, 22 S. Ct. 493, 184 U.S. 608, 46 L. Ed. 713. A decision of a state supreme court on a federal constitutional question affords a basis for jurisdiction by the United States Supreme Court. *Gant* v. *Oklahoma City*, 53 S. Ct. 530, 289 U.S. 98, 77 L. Ed. 1058. The Supreme Court of the United States has the duty by its decisions to preserve the supremacy of the laws of the United States and will disregard all state laws and state decisions which conflict therewith. *Amis* v. *Smith*, 41 U.S. 303, 16 Pet. 303, 10 L. Ed. 973.

TAXATION AND FEDERAL ISSUE

Appellees contend that a state may tax its citizens in any manner it so desires, and that such citizens are not entitled to the protection afforded by the equal protection of the laws clause of the Fourteenth Amendment. Appellant vehemently disagrees with this contention.

The state must take care to accord all in the same class equality of rights. *Walters* v. *City of St. Louis, Mo.*, 74 S. Ct. 505, 347 U.S. 231, 98 L. Ed. 660. Appellant recognizes that no iron rule of equality between different classes is necessary to prevent taxes from being declared unconstitutional. *State of Alaska* v. *Arctic Maid*, 81 S. Ct. 929, 366

U.S. 199, 6 L. Ed. 2d. 227. In the imposition of a tax, a state must proceed upon a *rational* basis, and may not resort to a classification that is palpably arbitrary. *Allied Stores of Ohio, Inc.* v. *Bowers*, 79 S. Ct. 437, 358 U.S. 522, 3 L. Ed. 2d. 480. Common justice requires that taxation so far as possible shall be equal. *Society of Savings* v. *Cottie*, 73 U.S. 594, 6 Wall. 594, 18 L. Ed. 897; *Union Passenger Ry. Co.* v. *City of Philadelphia*, 101 U.S. 528, 11 Otto 528, 25 L. Ed. 912.

Appellant also disagrees with the statement of appellees that such districts in Colorado have the authority and do levy taxes. Appellant submits that in Colorado only the County Commissioners of the county wherein the territory of the district is located levy such ad valorem taxes upon the property located therein.

CONCLUSION

Appellant concludes that appellees' Motions To Dismiss And To Affirm should be denied for the reasons as set forth in the Jurisdictional Statement and hereinabove.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

JOLLY *v.* MORGAN COUNTY JUNIOR COLLEGE DISTRICT ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO

No. 453. Decided November 10, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.